NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 15607

NORTH CAROLINA STATE BOARD OF EDUCATION,
Plaintiff,

v.

STATE OF NORTH CAROLINA and MARK JOHNSON, in his official capacity,
Defendants.

SUPERINTENDENT'S BRIEF IN REPLY TO PLAINTIFF'S RESPONSE

North Carolina Superintendent of Public Instruction Mark Johnson ("Superintendent"), through undersigned counsel, respectfully submits the following brief in reply to the response to the Superintendent's motion for summary judgment filed by the plaintiff North Carolina State Board of Education ("State Board") and the motion to dismiss filed by the State.

ARGUMENT

I. THE SUPERINTENDENT IS A CONSTITUTIONAL OFFICER ELECTED BY THE PEOPLE.

The statement in the heading above is as elementary and undisputed as any fact in this case. The office of Superintendent of Public Instruction is not authorized by statute. The Superintendent is not appointed by the Governor or the State Board. The office exists because the People of North Carolina enshrined it in their most important document and determined that he or she would be "elected by the qualified voters of the State." N.C. CONST. Art. III, §7(1).[1] This fact fatally undermines the State Board's reliance on all the out of state cases cited in its first two briefs. None of those cases address the situation before this Court, in which the General Assembly has chosen to allocate responsibilities concerning the public school system among two entities of *constitutional* moment, both of which were created to oversee public education.

[1] North Carolina's Constitution has provided for a popularly elected Superintendent of Public Instruction without interruption since 1868. N.C. CONST. Art. III, § 13 (1868).

Rather, the non-North Carolina cases the State Board cites in its briefs involve acts by legislative bodies that take authority committed generally to a constitutional entity and re-assign such authority to a board or individual for which the constitution makes no provision.

For example, the State Board cites a case in which the North Dakota Supreme Court considered whether a statute authorizing the Governor to appoint a "deputy enforcement commissioner" to enforce prohibition laws to the exclusion of the elected state's attorney and sheriff improperly infringed on the authority conferred upon the elected officers by the state constitution. *Ex parte Corliss*, 16 N.D. 470, 471-72, 114 N.W. 962, 963 (1907). The court reasoned that if the legislature had the power to appoint a substitute sheriff, it likewise could appoint a substitute governor, substitute attorney general, or a substitute court, concluding:

> The governor, attorney general and the judges are no more constitutional officers than are state's attorneys and sheriffs. It seems too obvious for discussion that the framers of the constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers, for the discharge of such functions. If this is not true, then of what avail are the provisions of the constitution above referred to?

Id. at 475, 114 N.W. at 964. The court's conclusion, that the legislature "cannot transfer the duties of any [constitutional] officers to a new office created by them" makes quite plain why the holdings in these cases are inapplicable to the instant case. *Id.* at 481, 114 N.W. at 967.

Unlike the "new" deputy enforcement commissioner in *Corliss*, the North Carolina Superintendent is an elected *constitutional* officer, and his office has "inherent functions" traditionally associated with the office. In North Carolina, the General Assembly has given form and shape to these "inherent functions" through the enactment of and amendments to Chapter 115C and other statutes providing for the public school system. The powers and duties

reallocated back to the office in the 2016 legislation all are within this notion of "inherent functions" discussed in several of plaintiff's out of state cases. The State Board has not cited nor discussed a single case involving legislative allocations of authority between two constitutional actors sharing the same subject matter space.[2]

In the same way, the Arizona Supreme Court's ruling that the legislature's creation of a "state purchasing agent" improperly stripped the duties and authority of the constitutional executive office of State Auditor is inapposite to the current case, despite having been cited by the State Board. *Hudson v. Kelly*, 76 Ariz. 255, 263 P.2d 362 (1953). This is, again, because the court was considering a constitutional entity that had lost power to a non-constitutional entity through legislative action, which is quite different from the case before this Court. As such, the State Board's parenthetical after citing the case in its response brief, claiming that state courts have "uniformly denounced the same arguments that Defendants make here," indicates that the State Board does not understand the Superintendent's arguments. Plaintiff's Response to Defendants' Motion to Dismiss and Motion for Summary Judgment ("Response Brief") at 7.

Plaintiff's discussion of the recent Wyoming case, *Powers v. State*, 318 P.3d 300 (Wyo. 2014) misses the mark for the same reason. That case involved legislation shifting powers from the constitutionally-provided Superintendent of Education to a statutorily decreed Director of the Department of Education. *Id.* The Wyoming court did not consider the constitutionality of a legislative reallocation of powers and duties among two entities of constitutional authority both charged with oversight of the public school system.

[2] To be sure, this "dual occupancy" of a single subject matter space likely is uncommon. North Carolina is one of only 13 states with an elected Superintendent. *See* Wikipedia, "State Education Agency" at https://en.wikipedia.org/wiki/State_education_agency (last accessed on 2 June 2017).

This is the same reason that the Superintendent did not discuss *Atkinson v. State* (09 CVS 6655 (Wake County Superior Court)) in previous briefs. It has no application to this case because it involved a transfer of powers from the Superintendent to a non-constitutional entity, the Chief Executive Officer ("CEO") of the Department of Public Instruction. Contrary to the State Board's assertion in its response brief, *Atkinson* did not involve "an attempted reallocation of constitutional roles *by the General Assembly*." Plaintiff's Response to Defendant's Motion to Dismiss and Motion for Summary Judgment ("State Board Response Brief") at 13 (emphasis supplied). Ironically, the CEO position and its powers were decreed *by the State Board of Education*, which amended its own Policy Manual to authorize the new CEO "to manage the Department of Public Instruction on a day to day basis subject to the direction, control, and approval of the State Board." Policy ID Number EEO-C-013.

Although not helpful to the State Board, *Hudson* and other out of state cases the State Board cites do shed light on the important issue of the legislature's role in allocating powers and duties to a constitutional office pursuant to constitutional clauses such as "[t]heir respective duties shall be prescribed by law[,]" in Article III, § 7(2) of the North Carolina Constitution. The constitutional language at issue in *Hudson* is nearly identical to that at issue in this case. The Arizona State Auditor is established as an executive branch office in the same provision that establishes the governor, secretary of state, treasurer, attorney general, and superintendent of public instruction. ARIZ. CONST., Art. V, § 1.[3] The Arizona constitution further provides that the "powers and duties of secretary of state, state treasurer, state auditor, attorney-general, and superintendent of public instruction shall be as prescribed by law." ARIZ. CONST., Art. V, § 9.

[3] Article III, § 1 of the Arizona Constitution has been amended since the 1953 *Hudson* opinion, but the provision cited has remained the same.

Despite this identical language, the State Board analogizes the North Carolina Superintendent to the legislatively created "state purchasing agent" in Arizona. In doing so, the State Board ignores that the North Carolina Superintendent stands on an equal constitutional footing with the State Board. It is instructive to consider the lengths to which the Arizona Supreme Court went in its *Hudson* opinion to reinforce the importance of this constitutional aspect of the office of State Auditor, despite the fact that the Arizona constitution neither defines the office nor prescribes its duties. The court observed:

> Clearly under the constitution the auditor is a member of the executive department of the state. Under our system of government, and of the state governments of the United States from the organization of the colonies and the states under our federal constitution, the offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning and statute. They are words of long antiquity and in reference to officers of a government refer to offices occupied by these officers at common law.

Hudson, 76 Ariz. at 260, 263 P.2d at 365.

After an extensive historical analysis of the office of state auditor, utilizing sources from across the country, the Arizona Supreme Court noted that the mere inclusion of the office in the text of the constitution implies a requirement that it exist and function in some fashion reflecting the powers and duties traditionally associated with the office.

> Sections 1 and 9 of Article 5 of the State Constitution have been construed to mean that there is an implied mandate to the legislature to prescribe the powers and duties of the executive officers created by the Constitution in Section 1 of Article 5. [citation omitted] The mandate considered the grant of such powers and duties as would enable the auditor to perform the functions for which the office was created. Under the terms of the mandate the legislature has the power to enlarge or remove the duties and powers of the office as the future might require. But the language of the sections as construed [negates][4] the power to destroy the offices created by removing all of the duties it was mandated to confer.
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>
> By the very nature of the office in our scheme of government, the duties imposed by statute are comparable to the common-law duties of the office, added to and enlarged as the economies and necessities of this 20th Century demand.

[4] The opinion uses the word "negatives" as a verb here.

Id. at 263, 263 P.2d at 367.

This principle is repeated throughout the State Board's out of state authorites. For example, in considering whether certain legislation deprived the Illinois State Treasurer of powers or duties, the Illinois Supreme Court observed:

> The constitution, by section 1 of article 5 provides that public officers, including the State Treasurer, shall perform such duties as may be required by law. Nothing in the constitution further defines the duties of the State Treasurer. This court has held that those duties are such as are to be implied from the nature of the office and of them he may not be deprived or relieved.

Am. Legion Post No. 279 v. Barrett, 371 Ill. 78, 91, 20 N.E.2d 45, 51 (1939).

Applied to the present case, this principle reinforces that the Superintendent is a constitutional entity that exists as a co-equal with the State Board. It means that the People of North Carolina have chosen essentially a bicameral approach to the leadership of the State's public school system. Nowhere else in State Government does the Constitution provide for two entities to exercise powers and duties simultaneously within a single field of government activity. It is in the light of this dual arrangement that the wisdom of the provisos "subject to laws enacted"/"as provided by law" is most apparent.

Throughout this case the State Board has argued jealously that any grant of authority that might be defined as "supervision" or "administration" of the public schools is in derogation of the constitutional "mandate" contained in Article IX, § 5. As the Superintendent argued in his principal brief, "these words, - 'supervise' and 'administer' – cover essentially everything." Superintendent's Principal Brief at 7. To interpret those terms in Article IX, § 5 as *not* being "subject to laws enacted by the General Assembly," as the State Board contends, would invalidate the decision of the People to have an elected Superintendent possessed of that authority and those duties prescribed by law (N.C. CONST. Art. III, §7(2)). The citizens of North

Carolina have decreed a Superintendent and a State Board shall oversee the public school system, have granted the General Assembly the authority to allocate powers and duties among them, and have empowered the General Assembly to make changes to such allocations of power and duties to meet the changing priorities of the People over time.

II. THE STATE BOARD HAS MISCHARACTERIZED THE HOLDINGS IN THE CONTROLLING NORTH CAROLINA CASE LAW.

The State Board's position in this case also is at odds with the North Carolina Supreme Court's decisions interpreting the "subject to laws enacted by the General Assembly" language discussed at length in prior briefing. The State Board's attempt to shoe-horn the holdings in *Guthrie v. Taylor* and *State v. Whittle Communications* so as to be consistent with its argument is reductive and, ultimately, unavailing. It characterizes both cases as involving "legislation *repealing* the Board's decisions." State Board Response Brief at 5 (emphasis in original). This characterization, however, is at odds with any reasonable description of the disputed actions in these cases, and any reasonable definition of the word "repeal."

As discussed at length in the Superintendent's principal brief, *Guthrie* involved a challenge to the authority of the State Board to promulgate a regulation concerning teacher certification requirements. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971). Our Supreme Court considered the "subject to such laws as may be enacted . . . by the General Assembly" sentence at the end of the predecessor provision to Article IX, § 5 and concluded that "[i]n the silence of the General Assembly (on the subject of teacher certification) the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools is limited only by other provisions in the Constitution itself." *Id.* at 710, 185 S.E.2d at 198-99. Thus, there is no *repeal* of any State Board decision in *Guthrie*. Even if the General Assembly had not opted for "silence" on the certification requirements issue and had

assigned it to the Superintendent or to local educational authorities, the Court would not have been contemplating a *repeal* of anything.

Likewise, *Whittle Communications* involved Court scrutiny of the fact that the General Assembly had given the authority to select and procure supplementary instructional materials to local school boards rather than the State Board. *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991). The General Assembly was not *repealing* any State Board decision in *Whittle*. If the decision to assign authority for selection and procurement of supplementary instructional materials to local school boards can be defined as a repeal of some State Board decision, then anything that the General Assembly might do that reallocates the relative authority between educational entities would amount to a repeal.

It appears the State Board's attempt to find a thread of consistency between its position and the holdings in *Guthrie* and *Whittle* is tied to language in the original provision in the Constitution of 1868 creating and empowering the State Board. The Superintendent argued this point at some length in his principal brief, and rather than re-argue would respectfully refer the Court to his principal brief at pages 13-14. In sum, the 1942 amendments to the original authorizing language in the 1868 Constitution clarified that the General Assembly's power to revise and limit the powers and duties of the State Board was far more than the authority simply to react to a State Board decision by repealing it, but included the power to limit and revise even the express powers and duties of the State Board. *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198.

The fragility of the State Board's argument is most apparent in its failure to address how the holding in *Whittle*, where the General Assembly had reassigned to a *non-constitutional entity* duties that clearly fall within the ambit of the constitutional mandate to "supervise and administer," can be squared with the outcome sought by the State Board. The Court in *Whittle*

held that the State Board "did not have authority" to take measures to prevent contracts between the defendant and local school boards because the General Assembly had placed the issue "in the exclusive domain of the local school boards." *Id.* at 466, 402 S.E.2d at 561-62. If the "subject to laws enacted by the General Assembly" language allows this transfer of powers from the State Board, without question it allows the reallocation of powers and duties that the General Assembly provided for in HB 17. *Whittle* and *Guthrie* (and the cases following those decisions cited in prior briefings) remain good law in North Carolina, and the State Board has failed to provide any cogent explanation for how those decisions might support any outcome other than summary judgment in favor of the Superintendent.

III. THE 1971 AMENDMENTS TO THE NORTH CAROLINA CONSTITUTION CONTEMPLATE AN INDEPENDENT, NOT SUBSERVIENT, ROLE FOR THE SUPERINTENDENT RELATIVE TO THE STATE BOARD.

The State Board correctly notes that the 1971 amendments to the North Carolina Constitution eliminated the voting role of the Superintendent on the State Board. State Board Response Brief at 10. This change did eliminate a source of potential conflict, in that the Superintendent, as the chief administrative officer of the State Board pursuant to Art. IX, § 4 *and* as a constitutional executive officer with such other duties as shall be prescribed by law pursuant to Art. III, § 7, could be viewed as having an interest separate from the State Board in voting on policy as a member of that Board.

The contention that the Superintendent's role as an elected constitutional officer is limited to "tak[ing] minutes of the Board's meetings and carr[ying] out various administrative functions at the direction of the Board" (*id.*) is distorted to the point of absurdity. Not only does such a contention misstate the role of the Superintendent under Article IX, but as discussed above, it completely ignores that as an Article III executive officer he has a co-equal role in the

leadership of North Carolina's public school system "of [which] he may not be deprived or relieved." *See discussion supra* at pp. 3-5.

Even assuming the Article IX language amounted only to authority to take minutes at meetings and perform odd jobs as the State Board argues, to treat that as an exhaustive description of the powers and duties of the Superintendent would mean that the words of Article III, § 7(2), "[the Superintendent's] duties shall be prescribed by law" have no meaning. This would violate what the State Board called "the first and most basic rule of constitutional construction, which requires giving effect to each and every word of the text." *See* State Board Principal Brief at 14 and cases cited. Clearly the phrase "duties shall be prescribed by law" in Article III, § 7 means more than "secretary and chief administrative officer" of the State Board as provided in Article IX, § 4. As argued by the plaintiff, under this canon of textual interpretation courts must "lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904). Here, the canon requires the conclusion that if the framers had intended the language of Article IX, § 4 to be an exhaustive and limiting description of the duties of the elected office of Superintendent, they would have provided in Article III, § 7 that such duties "are as provided in Article IX, § 4" rather than "shall be as prescribed by law." By phrasing Article III, § 7(2) as they did, the framers clearly envisioned the Superintendent as more than what is described in Article IX, § 4.

This also is consistent with the general principle (observed in all of the out of state cases plaintiff cited in prior briefing) that state constitutional officers are inherently vested with a leadership role consistent with the nature of the office, as discussed above. This principle supports the conclusion that the People of North Carolina, in enacting a constitution providing

for two leadership entities, intended those entities to serve as complementary yet independent actors subject to the plenary authority of the General Assembly. As the supreme governing and policy-setting entity with regard to North Carolina's public schools, the General Assembly's reallocation of relative powers and duties among the Superintendent and the State Board in HB 17 is a legitimate exercise of its constitutional mandate.

IV. THE STATE BOARD HAS NOT MET ITS HEAVY BURDEN OF PROVING THAT EACH CHALLENGED PROVISION IS UNCONSTITUTIONAL.

"In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684-85 (1993). "When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985).

As mentioned in prior briefing, the State Board has challenged sixty-two specific provisions of HB 17 as unconstitutional, but only has devoted specific discussion to four of them in prior briefs. In his response brief, the Superintendent provided detailed rebuttal concerning each of the four provisions, demonstrating that each was a proper exercise of legislative authority. But the sixty-two challenged provisions cover a wide spectrum of subject matter, and the State Board's arguments, such as they are, regarding the constitutionality of the four provisions actually discussed have little to no bearing on the constitutionality of many of the remaining fifty-eight.

For example, many of the challenged provisions relate to personnel matters, including hiring staff for the Department of Public Instruction. The State Board has failed even to attempt

to explain how these provisions amount to an unconstitutional infringement on its authority. To be sure, if the General Assembly is within its constitutional authority when it confers exclusive authority for selection and procurement of certain educational materials to local school boards, as was the case in *Whittle Communications*, it cannot offend the Constitution for it to grant certain hiring powers to the Superintendent. At a minimum, the State Board has a burden of demonstrating why such personnel matters fall within its claimed inviolable sphere of constitutional powers. The State Board has not even attempted to meet that burden.

The inclusion of some provisions in its amended verified complaint are inexplicable without further discussion. For example, the State Board challenges the following amendment to N.C. Gen. Stat. § 115C-21(b)(9), which is an item on a list of the Superintendent's duties as Secretary to the State Board:

> (9) To perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the ~~Board may assign to him from time to time~~ Board.

S.L. 2016-126. Is the State Board complaining that the Superintendent's performance of duties "necessary and appropriate" in the role of secretary is an unconstitutional infringement of its inviolable powers? Is the State Board complaining that the removal of the words "Board may assign to him from time to time" renders the statute unconstitutional, as if the General Assembly, having added the provision in 1981 (S.L. 1981-423), is required to keep it on the books? Is it both? Is it something else?

The State Board has left it to this Court to pore over the remaining fifty-eight provisions and to adjudicate the constitutionality of each without the aid of briefing by the parties, and in so doing, has abdicated its legal burden. The State Board has not advanced any argument suggesting that, should this Court determine that one of the sixty-two challenged provisions is

unconstitutional, it follows that all the others must be invalidated. As discussed in prior briefing, the General Assembly included a severability clause in HB 17 providing that if any provision is held invalid, it is to be severed from the act and all other provisions shall remain intact. The State Board has failed to meet its burden, and the Superintendent is entitled to entry of summary judgment on each challenged provision.

V. THE PURPOSE OF THE SUPERINTENDENT'S AFFIDAVIT IS TO PROVIDE CONTEXT TO THE GENERAL ASSEMBLY'S CONCERN WITH CLARIFYING THE STATE BOARD'S CONTINUING ROLE IN THE OVERSIGHT AND SUPERVISION OF NORTH CAROLINA'S PUBLIC SCHOOLS AND EDUCATIONAL FUNDS.

The General Assembly's passage of HB 17 was an appropriate exercise of legislative policy-setting authority regarding management of North Carolina's public schools. The State Board's response brief criticized the affidavit submitted by the Superintendent as an irrelevant "litany of complaints." However, the details set forth in the Superintendent's affidavit were intended to bring attention to the challenges that have arisen in the day-to-day management of the Department of Public Instruction and to give light to the ongoing issues with the State Board's continuing role in the oversight and supervision of the Department. These challenges, many of which have persisted for years, may explain in part why the General Assembly, pursuant to Articles III and IX, restored the Superintendent's authority that had been subordinated by the 1995 legislation.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this panel enter an order declaring that the legislation challenged in plaintiff's Amended Verified Complaint is

constitutional, dissolving the preliminary injunction, and entering final judgment against plaintiff and in favor of the Superintendent and the State of North Carolina.

This the 9th day of June, 2017.

BLANCHARD, MILLER, LEWIS & ISLEY, P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Superintendent's Brief in Reply to Plaintiff's Response** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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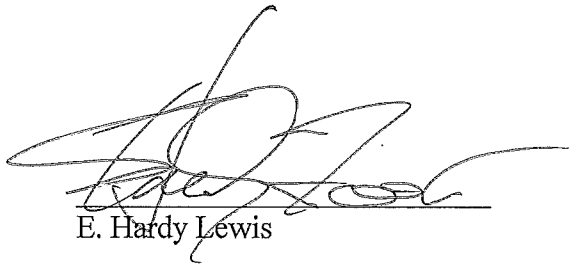
This the 9th day of June, 2017.



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